IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
Petitioner,

vs.

CHARLES T. McKEOWN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court here sought to be reviewed is reported at 52 Fed. (2d) 331. [R. 28-30.] The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 148 Fed. (2d) 890. [R. 48-51.]

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered April 21, 1945 [R. 51], and on May 22, 1945, the Court denied petition for rehearing without opinion. [R. 53.] The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 347 (a).

Statement of the Case.

Respondent brought this action under the provisions of Section 7 and Section 16 (b) of the Fair Labor Standards Act of 1938, for overtime compensation and liquidated damage. Respondent alleged that petitioner was engaged in transporting goods in interstate commerce, and employed the respondent in the transportation of goods, wares and merchandise in and for interstate commerce. [R. 3.] In paragraph I of petitioner's answer to respondent's first amended complaint, it alleged that a very large percentage of its business consisted of intrastate traffic, and only a very small percentage consisted of interstate traffic, and that the hauling and carrying of merchandise to and from points outside of the State of California was less than 1% of the total hauling performed by petitioner. [R. 11.] It was stipulated by petitioner and respondent that petitioner, Southern California Freight Lines, was engaged as a common carrier in interstate commerce to the average extent of 7% of its total business. [R. 22-3.] It was also stipulated by petitioner and respondent that the activities of respondent in his employment by petitioner were concerned with and connected with interstate commerce to the extent of 7% of respondent's total activities during each and every day of each and every week in his said employment. [R. 24-5.] The trial court, in its conclusions of law, stated that the activities of respondent in his said employment during the period involved were sufficiently concerned and connected with the interstate operations of Southern California Freight Lines so as to bring his said employment under the provisions, and to entitle plaintiff to the benefits of said Fair Labor Standards Act, pursuant to Section 7 thereof; 29 U. S. C. A. 207; and pursuant to Section 16 thereof; 29 U. S. C. A. 216. [R. 27.]

Specifications of Errors.

The Court erred in affirming the action of the trial court in granting judgment for the respondent upon the complaint and evidence before it.

ARGUMENT.

The questions presented by the petition for writ of certiorari are under two points:

1. Respondent, employee, was not engaged in a substantial amount of activity in interstate commerce to entitle him to the benefits of the Fair Labor Standards Act.
2. Petitioner is substantially engaged in local business which Congress did not intend to bring within the purview of the Fair Labor Standards Act.

1. Respondent, Employee, Was Not Engaged in a Substantial Amount of Activity in Interstate Commerce to Entitle Him to the Benefits of the Fair Labor Standards Act.

The parties stipulated that the activities of respondent in Interstate Commerce was 7% of his total activities. The question is whether 7% is a substantial amount within the meaning of the decisions of this Court, particularly *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Bros.*, 317 U. S. 572, or within the meaning of the following decisions of the United States Circuit Court of Appeals:

Walling v. Mutual Wholesale Food & Supply Co., 141 Fed. (2d) 331, of the Eighth Circuit, decided March 8, 1944;

Walling v. Silver Bros. Co., 136 Fed. (2d) 168, of the First Circuit, decided May 21, 1943;

Bracey v. Luray, 138 Fed. (2d) 8, decided September 16, 1943, by the Fourth Circuit;

Crown Overall Mfg. Co. v. Walling, of the Sixth Circuit, decided May 7, 1945;

Walling v. Goldblatt Bros., 128 Fed. (2d) 778, of the Seventh Circuit, decided June 25, 1942;

Schwarz v. Witner Grocer Co., 141 Fed. (2d) 341, of the Eighth Circuit, decided March 9, 1944.

Petitioner does not contend that "substantial amount" necessarily means the same as "greater part," as the Fair Labor Standards Act requires in connection with retail or service establishments. The Administrator of the Fair Labor Standards Act has in many situations taken action if 20% of the employees' activities were in interstate commerce. In cases of employment in which the employee engages indiscriminately both in intrastate and interstate activities, it seems reasonable that at least 20% of the activities of the employee should be in interstate commerce before benefits of the Fair Labor Standards Act are applicable to him.

Circuit Judge Denman, who wrote the opinion for the Ninth Circuit, after quoting from the decision in *Walling v. Jacksonville Paper Company, supra,* to the effect that a substantial part of employees' activities must be shown in interstate commerce, stated as follows:

> "This statement throws no light on what percentage of an employee's time in interstate commerce is unsubstantial. Since the Act is concerned with wages and hours, it is apparent that if there had been a cut of 7% in the employee's pay check it would not

be regarded as unsubstantial or *de minimis* by any laborer or his union. Nor would a reduction of his 8-hour day of 7%, that is to 7 hours and 27 minutes, be regarded as unsubstantial. No leader of a labor union nor its members would regard such a reduction of the labor day an unsubstantial gain." [R. 50.]

The foregoing opinion leads to the conclusion that the Ninth Circuit is ignoring one important interpretation of the statute in question, namely, that Congress was faced with the policy of deciding to what extent it would exercise jurisdiction over intrastate activities. On this point, this Court stated in the *Kirschbaum* case, *supra*, on page 521, as follows:

"We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the states activities which, if isolated, are only local."

The Ninth Circuit Court did not apply the principles of statutory construction set forth in the quoted portion of the *Kirschbaum* case, *supra*. It appears fairly certain from the opinion of the Ninth Circuit that it considers

jurisdiction under the Fair Labor Standards Act and Wagner Act to be governed by the same principles. We quote from the opinion as follows:

> "It is true that employees whose activities merely affect interstate commerce are not within the Fair Labor Standards Act, though within the Wagner Act. However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act." [R. 50.]

One statement in the opinion of the Circuit Court leaves the impression that 7% of employee's activities was somewhat meager to constitute a "substantial amount." We quote again from the opinion:

> "It is also a proper inference that since the employee was engaged with reference to the bills of lading, it would take no more of his time on interstate than on intrastate bills. The longer interstate hauls with larger freight earnings would concern more than 7% of the employer's total income." [R. 50.]

We are at a loss to understand how the inference is justified that the respondent, employee, worked longer on interstate bills of lading than on intrastate bills of lading. Certainly the record is entirely silent on the subject. We assume, therefore, that the Court is also inferring that the interstate hauls consisted of transportation service by petitioner from or to points in California and to or from points in another state. The latter inference is also unfounded for the reason that the interstate traffic in which respondent participated with his services were shipments brought into Los Angeles, California, by other transportation agencies and distributed by petitioner to communities surrounding Los Angeles just as it transported local

traffic from Los Angeles to other points in Southern California.

We apologize for referring to some facts that are not fully covered by the record. We deem it important, however, not to leave an impression unanswered that the interstate activity engaged in by respondent consisted of transportation service of petitioner from or to a point in California and from or to a point in another state. There is no basis for the inference that petitioner received more revenue on an interstate bill of lading than he received on an intrastate bill of lading, or that interstate hauls were longer than intrastate hauls.

At the end of the opinion of the Circuit Court, the Ninth Circuit Court of Appeals states that it agrees with the opinion of the Tenth Circuit Court of Appeals in the *New Mexico Public Service Company v. Engel* case, 145 Fed. (2d) 636, wherein it appeared that the activity of the employee was only 4% of his entire activity. [R. 51.]

2. Petitioner Is Substantially Engaged in Local Business Which Congress Did Not Intend to Bring Within the Purview of the Fair Labor Standards Act.

The facts in this case show that petitioner is a local concern. The small amount of interstate traffic handled by it should not bring it within the controls of the Fair Labor Standards Act. We believe that the facts of the instant case bring it within the principles decided in the recent case of this Court in *10 East 40th Street Building Inc. v. Callus*, decided June 11, 1945. We quote from that decision as follows:

> "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress

did not see fit to take over by legislation. Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

Conclusion.

On the ground that the respondent did not perform a substantial amount of work in interstate commerce, and on the further ground that the business of petitioner is essentially a local business within the meaning of the Fair Labor Standards Act, we respectfully submit that this Court should review the decision of the Circuit Court of Appeals and reverse same.

Respectfully submitted,

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